

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06-08-2010
PHILIP G. URRY, CLERK
BY: GH

BRENT E. JOHNSON,)	1 CA-IC 09-0083
)	
Petitioner,)	DEPARTMENT E
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
THE INDUSTRIAL COMMISSION OF ARIZONA,)	Rule 28, Arizona Rules
)	of Civil Appellate
Respondent,)	Procedure)
)	
SPRAYFOAM SOUTHWEST, INC.,)	
)	
Respondent Employer,)	
)	
SCF OF ARIZONA,)	
)	
Respondent Carrier.)	
)	
)	

Special Action - Industrial Commission

ICA Claim No. 20063-180665

Carrier Claim No. 0650239

Administrative Law Judge Robert F. Retzer

AWARD AFFIRMED

Brent Edward Johnson, Petitioner
In Propria Persona

Glendale

The Industrial Commission of Arizona
By Andrew Wade, Chief Counsel
Attorney for Respondent

Phoenix

H A L L, Judge

¶1 This is a special action review of the Industrial Commission of Arizona's (the Commission's) decision on review denying reopening of an industrial claim. The petitioner, Brent Edward Johnson (Johnson), argues that the Administrative Law Judge (ALJ) erred by refusing his petition to reopen his workers' compensation claim. We affirm the award.

FACTS AND PROCEDURAL HISTORY

¶2 On November 7, 2006, Johnson sustained a lower back injury while tearing out a lead pipe jack on a roof for his employer, Sprayfoam Southwest, Inc. (Sprayfoam). Johnson's back "went out," causing him to fall forward on the roof. Johnson had experienced similar pain in July of 2005 while working for a prior employer, but the pain on this occasion was more severe. Three days later, Johnson went to the emergency room for treatment. He ultimately transferred to a rehabilitation center for further treatment, where he had an MRI of his back taken.

¶3 After stipulating with the carrier on his claim for lost wages, Johnson requested a hearing on his claim for ongoing disability. In preparation for the hearing, Johnson was examined by two doctors: Dr. Maric and Dr. Araghi. Araghi testified that

Johnson's symptoms did not correlate with the November MRI; in particular, Johnson reported that a straight leg raise in the supine position was negative, and in fact made him feel better. Maric agreed that the symptoms did not correlate with the MRI, and testified that the examination results were "inconsistent, exaggerated, and lacking objective findings to explain [Johnson's] symptoms." Maric disagreed with Araghi's recommendation of electromyogram (EMG) testing, because in his opinion "any nonspinal condition the testing might reveal would be unrelated to the industrial claim." The ALJ resolved the conflict in the expert evidence in favor of Maric as being more well-founded, and awarded Johnson disability compensation, medical, surgical and hospital benefits from the time of the injury to April 12, 2007.

¶4 Johnson sought further treatment. On September 9, 2008, Dr. Amrani, an orthopedic spinal surgeon, examined Johnson and recommended surgery. Amrani performed the surgery, which consisted of laminectomies and discectomies, on September 15, 2008.

¶5 Johnson filed a petition to reopen his claim, and offered Amrani's testimony in one of the Commission's hearings on the petition. Amrani offered his opinion that the surgery he performed on Johnson was due to his industrial injury. Amrani testified that he observed a herniated disc on Johnson's MRI, and observed back and leg pain, with "numbness and tingling in the feet in the

radicular distribution." Amrani admitted that he did not review any of Johnson's prior medical records. Amrani also testified that Johnson did not get a good result from the surgery. Due to a computer glitch, the record of Amrani's testimony was lost, so the court recalled Amrani to testify again on October 19, 2009.

¶6 The ALJ also heard testimony from Dr. McLean, who conducted an independent examination of Johnson on February 26, 2009, and reviewed the records from Johnson's prior examinations by Maric and Araghi. McLean offered his opinion that he found no condition related to Johnson's November 7 injury that was "new, additional, or previously undiscovered" as of the closure of the original claim. In his examination of Johnson, McLean noted abnormal pain behavior, a lack of atrophy in the lower extremities, nonspecific pain patterns, and a negative straight-leg-raise test. Like Maric and Araghi, McLean found no objective basis for Johnson's pain behaviors in his examinations of MRI and CT scans of Johnson's spine. McLean observed that Johnson's pain level had actually increased after surgery, despite his post-operative use of more potent narcotic medications. He also noted that Johnson was suffering from "failed back surgery syndrome," which was a predictable outcome based on his pre-surgery symptoms.

¶7 The ALJ denied Johnson's petition to reopen his claim on August 4, 2009. The ALJ found that McLean's testimony was "most

probably correct and well-founded." The ALJ reasoned that Johnson's failed back surgery and Johnson's lack of post-operative pain relief was consistent with McLean's examination findings. The ALJ also observed the abnormal pain behavior and lack of objective findings from the prior examinations, and cited Arizona Revised Statutes (A.R.S.) section 23-1061(H) (Supp. 2009), which provides: "A claim shall not be reopened because of increased subjective pain if the pain is not accompanied by a change in objective physical findings." The Commission denied Johnson's request for review of the ruling on October 13, 2009.

¶18 Johnson timely filed this special action to review the Decision upon Review. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶19 As a preliminary matter, we note that in his statement of the case, Johnson claims the Commission erred by issuing a decision on his petition after losing the record of Amrani's original testimony, but before re-taking and transcribing the testimony. Johnson does not claim that Amrani's re-taken testimony is significantly different than his original testimony before the ALJ. As set forth in A.R.S. § 23-941(E) (1995), the Commission is only required to transcribe a record when a party applies to the court

of appeals for a writ of certiorari pursuant to A.R.S. § 23-951. Accordingly, the ALJ did not err by ruling before the testimony that he had heard was transcribed.

¶10 Johnson purports to make two arguments on appeal, but they actually consist of one claim: that the Commission's decision not to reopen the claim, based on McLean's expert testimony, was not sufficiently supported by evidence on the record. Specifically, Johnson contends that McLean's opinion was not sufficient because he did not review all prior medical documentation, including an EMG done on November 11, 2008. "It is the ALJ's responsibility to resolve conflicts in the medical evidence, and we will not disturb that resolution unless it is 'wholly unreasonable.'" *Gamez v. Indus. Comm'n*, 213 Ariz. 314, 316, ¶ 15, 141 P.3d 794, 796 (App. 2006) (quoting *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979)). We view the evidence in the light most favorable to upholding the ICA award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). We defer to the ALJ's factual findings and review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003).

¶11 The ALJ's resolution of the conflicting medical testimony in this case was not unreasonable. Even if McLean did not review every part of the medical record, the ALJ reasonably concluded that

his testimony was more probably correct than Amrani's because McLean's explanation of the condition was consistent with the other doctors' prior examinations and with Johnson's unfavorable surgery outcome. Indeed, McLean had reviewed more of the prior medical record than had Amrani, who admitted he had reviewed none of it. In any event, the burden of establishing a "new, additional, or previously undiscovered condition" caused by the prior injury and "accompanied by a change in objective physical findings" is on the claimant. A.R.S. § 23-1061(H). Given the conclusion of three doctors that Johnson's pain did not correlate with the objective scans of his spine, it was not unreasonable for the ALJ to find that Johnson had not met this burden, whether or not McLean reviewed every one of Johnson's medical records.

CONCLUSION

¶12 For the foregoing reasons, we affirm the award.

/s/

PHILIP HALL, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

PATRICK IRVINE, Judge